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In The

Supreme Court of the United States

October Term 1954

No. 325

PEONY PARK, INC., (Consolidated herein with Eight Others who were Appellants Below) PETITIONERS,

V.

GEORGE W. O'MALLEY, Collector of Internal Revenue, Omaha, Nebraska (and the UNITED STATES OF AMERICA), RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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GEORGE W. O'MALLEY, Collector of Internal Revenue, Omaha, Nebraska (and the UNITED STATES OF AMERICA), RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE HONORABLE THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

(The nine Petitioners whose names appear on the Title Page of the Record, did consolidate by Stipulation and Orders of the Courts below (R 1; 140; 34-6) their respective causes of action against the Appellees below and Respondents herein. Each Petitioner now seeks review on certiorari by this one Petition for all, under Supreme Court Rule 23 (5), because involving identical questions of law and closely related facts.)

The Petitioners pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cases, on June 24, 1955 (appended hereto).

OPINIONS BELOW.

The Memorandum Opinion of the United States District Court for Nebraska, dated June 28, 1954, is reported in 121 Fed. Supp. 690, and is copied verbatim at pages 99 to 108 of the Printed Record submitted with this Petition.

The Opinion of the Court of Appeals for the Eighth Circuit, dated June 24, 1955, sustains the said District Court, and will be reported in the Federal Reporter. An exact copy thereof is appended to this Petition for the Writ of Certiorari. A certified copy thereof is attached to the original Certified Record from below filed in this Court.

JURISDICTION.

The Judgment of the Court of Appeals was entered on June 24, 1955, and became final in that Court without further proceedings therein. The Supreme Court's jurisdiction is invoked under Title 28 U.S.C., Sec. 1254 (1), 62 Stats. 928. The Courts below had jurisdiction under Title 28 U.S.C., Ch. 85, Sec. 1340; 62 Stats. 932; Int. Rev. C. Title 26, U.S.C., Ch. 37, Sec. 3772, 64 Stats. 1280.

QUESTIONS PRESENTED FOR REVIEW.

Whether or not the Court below as:

(a) A matter of statutory, constitutional or decisional laws should have upheld the Commissioner of Internal Revenue, Respondent herein, by denying refunds to each Petitioner, of certain excise taxes levied in large amounts and paid by each Petitioner, and,

(b) whether or not the Court erred in holding the Petitioners liable for the excise taxes in question when

Congress had expressly stated prior to the decisions below, that the businesses as conducted by Petitioners were non-taxable, under the revenue statute in question, and,

(c) whether or not the Court below erred in upholding the said Respondent when the opinion in the District Court found as a matter of fact that the Respondent Commissioner had intentionally and willfully discriminated against Petitioners in the laying and collecting of the excise taxes in question (1948 to 1951) and,

(d) whether or not such discrimination violated the uniformity clause of the Constitution of the United States, Art. 1., Sec. 8, Clause 1; and,

(e) whether or not it was a denial of due process and equal protection of the law for the Courts below to have denied the Petitioners the benefit of definite Congressional legislation passed to remedy by refund of erroneous interpretation of Taxing Statutes and,

(f) was it erroneous and a denial of due process for the Court below to hold that such Congressional act was inapplicable to Petitioners' cases; and,

(g) whether or not the revenue statutes in question were applicable to Petitioners as a matter of law in any event under the non-conflicting competent and convincing admitted evidence of record.[1] (R. 57-9,60-1-2-3).

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[1] This footnote index to parts of the Record shows that the questions here presented were the issues presented to the United States District Court, and the United States Court of Appeals for the Eighth Circuit.
R.105-6-7; R. 20-1-2-3-4; R. 36-7-8-9; R.30-3; R. 34-5; R. 37-8; R. 108-110, R. 2 (Vide Record: Stipulation R. 1;) to 10; R. 16 to 25.

(Continued on next page)

STATUTES INVOLVED.

(The printed Record contains copies of the statutes.)

U. S. Constitution Art. I, Section 8, Clause 1.

Int. Rev. Code, Title 26, U.S.C., Sec. 1700(a) and 1700(e) (1), and Sec. 1700, Historical Notes. Analyzed historically and adopted by Congress as its intent, in *Geer* v. *Birmingham*, 88 F. Supp. 189, with Congressional comment (R. 55).

Int. Rev. Code 1951, Title 26, Sec. 404, (1946 Cum. Supp. p. 348) (R. 55).

Report House Ways & Means Committee, Re: Amendment Sec. 1700(e) (1) of Int. Rev. Code. Congressional Service 82 Congress First Session Vol. II., pp. 1915, and 2089 (R. 55).

Hearing before House in 1951, Revenue Revision, pp. 2509, 2511, and part of 2512 (R. 49 to 55).

Internal Rev. Code Sec. 3772, 64 Stats. 1280.

STATEMENT OF THE CASE.

1. Each Petitioner separately owned and independent of the others, operated a ballroom in Nebraska continuously since prior to 1942. The operations in each case were the same, i.e., an admission was charged at the door for the privilege of attending the dance,

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(Continued from page 3)

Vide Records Stipulations p. 1; Fifth Amendment p. 11; Peony Park Amended Complaint, R. 16; R. 21, par. X to XV; Amendment to include Uniformity Clause, R. 24; Appellee's Answers, R. 30-3; Order, R. 33-4; Stipulation Re-filings in one case apply to all, R. 34-5; Order to Produce, R. 37,8; Evidence other states, R. 48; Opinion U.S.D.C. Below, R. 105-7; Motion New Trial, R. 110, par. 8; Points for Reversal, R. 125-6 and par. I, R. 128, and par. II, R. 129, par. XVI, R. 134.

the admission varying in amount depending on the place. Some of their ballrooms were larger and better furnished than others. An excise tax equal to 20% of the admission charge was paid by the patrons to the Petitioner and was remitted to the Collector, as required by the Internal Revenue Code, Section 1700 (a), known as the "Admission Tax Statute", which has been in force since 1917 (26 U.S.C.A., Sec. 1700 Historical Note, *Geer* v. *Birmingham*, 88 F. Supp. 189). This tax is applicable to all places where a charge for admission is made at the door, such as dances, skating rinks, athletic contests, shows, exhibitions, performances and musical entertainment of all kinds. Petitioners always have been admittedly placed in that tax classification by Respondents and concerning which placement and tax there is no question.

2. By Stipulation the amounts of Taxes in each case are as follows, R. 97:

		Paid Under I.R.C. 1700(a)	Paid Under I.R.C. 1700(e)
R-71-2	Peony Park, Inc., Omaha (Ex. 28)	$104,948.56	$43,933.39*
R-76	Geraldine Webber, Norfolk (Ex. 37)	4,306.94	5,178.88
R-78	Glen Webber, Norfolk (Ex. 38)	2,458.69	3,080.32
R-79	Kings Park, Norfolk (Ex. 39)	17,035.43	11,299.03
R-81	Pauley—Turnpike, Lincoln (Ex. 40)	14,332.92	5,120.09
R-86	Sloan—Pla-Mor, Lincoln (Ex. 43)	22,752.99	10,712.54
R-89	Ferguson, Lincoln (Ex. 44)	4,922.22	1,815.13

R-91	Schamp—East Hills, Lincoln (Ex. 45)	11,873.89	7,064.40
R-95	Howells Fire Dept., Howells (Ex. 46)	18,374.70	7,166.56
		$211,006.34	$95,370.34

The $95,370.34 was enforced in some instances under threat of distress warrant (R. 75; 80; 81-2; 93-4) and in all cases was enforced in 1949, 1950 or 1951, dating back to Sept. 1, 1948 (R. 75; 76; 80; 81-2; 86; 89; 92; 93). The payments were in no case voluntarily made under 1700(e).

3. All nine Petitioners paid the admissions tax of $211,006.34* during the certain period of 38 months in question (Sept. 1, 1948, to Nov. 1, 1951). During that time only Nebraska ballrooms were taxed by Respondents as distinguished from exact operations in other states under I.R.C. Sec. 1700(e) (R. 39-49) for a 20% tax based on the gross income received from selling refreshments to the dancers. Petitioners continuously since the enactment of Sec. 1700(a) which was long prior to 1942 in each case have paid that tax without question. It is the 20% excise tax aggregating $95,370.04 collected and termed a "cabaret tax" under the Internal Revenue Code, Sec. 1700(e), during the same 38 month period that was questioned below and refund relief denied.

4. Petitioners claimed the clearly expressed intention of Congress was a tax of 20% on admission under 1700

* For part of the 38 month period from Sept. 1, 1948, to January 1 1950, the Petitioner, Peony Park, Inc., filed claims in abatement instead of refund (R. 4, 5) for a part of the cabaret tax. A stipulation is of record that the claims for abatement will abide the decision herein on the refunds (R. 33-4).

(a) or a 20% tax on food and refreshments under 1700 (e) where no admission charge was made (R. 51,55); (*Wilmette Park District* v. *Campbell* (1949) 338 U.S. 411, 70 S. Ct. 195 footnote 5).

5. This fact is disclosed: That from 1942 the Congressional legislative plan was to levy a tax in lieu of an admission tax if the place of entertainment made no admission charge at the door. So, an excise tax (of 20%) under a new statute was passed in 1942 (1700[e]) to meet the no admission situation. This tax under 1700 (e) was thus passed to place a direct tax on food and drink in dining rooms supplemented by entertainment and performances for which no admission charges were made or collected. Dancing was not essential for the enforcement of the 1700(e) cabaret tax. These facts have now been confirmed as a matter of expressed congressional intent (R. 49; 55; *Geer* v. *Birmingham*, 88 F. Supp. 189).

The 1951 Report of the House Ways and Means Committee Re: Amendment to Section 1700(e), U.S.C.A. 26, Internal Revenue Code, Congressional and Administrative Service, Eighty-Second Congress, First Session, Volume II, pages 1915 and 2089, decided the question of Congressional intent by a clear expression therein set forth (R.55).

6. The Congressional Committee stated in 1951 (R. 55):

> "The purpose of this amendment *is to make it clear that the principles* set *forth by the district court in the case of Geer* v. *Birmingham* (88 F. Supp. 189) are controlling in the determination of whether the establishment involved is operating

as a cabaret or as a dance hall, and to avoid the broad construction placed upon the statute in the case of Avalon Amusement Corporation v. United States (165 F. 2d 653) and in the court of appeals decision reversing the decision of the district court in the Geer case (Birmingham v. Geer, 185 F. 2d 92) which require that dance halls and similar establishments be taxed as cabarets, even though the serving or selling of food, refreshments, or merchandise is merely incidental."

From Page 2089 (R. 55):

"2. Cabarets—Section 404 of your committee's bill relates to ballrooms and dancing halls. Some courts have construed the cabaret tax to apply in the case of ballrooms and dancing halls merely because it was possible to purchase incidental refreshments, services or merchandise in such places. Both your committee's bill and the House bill amend section 1700(e) of the code to provide that the cabaret tax shall not apply in such cases. It is estimated that the revenue effect of this provision will be negligible."

7. However, beginning with September 1948 and continuing through October 1951, or a period of 38 months, each of the Petitioners was forced to pay, some under threat of distress warrant, this excise tax admittedly based on the cabaret tax (1700[e]), although, the Petitioners operations were uniformly that of a ballroom paying the admission tax of 20% during all of said period and for many years prior and since and now (R. 56; 60; 70; 75; 79; 80-3; 85; 88-90; 91-3; 94-6). The excise tax in question was a "cabaret tax" (1700[e]) of 20% of the amounts received for popcorn, peanuts,

candy bars, Coca Cola, Seven-Up, and similar merchandise sold incidentally to the admission-paying dance patrons who had already been taxed 20% at the door (R. 57-61; 75-6; 77; 79; 81-4; 85-7; 89-90; 92-3; 95-6).

8. No further collections of cabaret taxes were made after Congress explained the words, "cabaret, roof garden, or similar place", in the 1951 explanatory enactment (R. 49; 55).

9. The historical facts of record indicate it was never intended by Congress that a cabaret tax should apply to a dance hall or a ballroom where admission was charged at the door and the tax was paid thereon, according to the Congressional Committee Reports (R. 55) and the Historical Setting of Sec. 1700, Title 26, U.S.C.A. (R. 49). As a further factual matter, the historical resume of the admissions and cabaret tax written by United States Judge Graven in *Geer* v. *Birmingham* (88 F. Supp. 189), Jan. 10, 1950, U.S.D.C., Iowa, and referred to in the above Congressional Report, has never been questioned for accuracy nor overruled as a matter of law on those facts set forth in that regard in the opinion. The decision was reversed because the Court of Appeals stated the statute covered dance halls as well as cabarets where no admission tax was paid. However, these (Geer case, U.S.D.C.) facts have now been adopted by Congress as expressing its intention (R. 55) that dance halls charging admissions were not to be taxed as cabarets. The Legislative history concerning 1700(e) as a factual matter may be taken from the same source referred to in the Congressional Hearings and Report of 1951 (R. 49-55). Also the United States Supreme Court in the *Wilmette* case gave a similar expression in reference to

1700(e) and 1700(a), 338 U. S. 411, 70 S. Ct. 195 (1949) footnote 5.

10(a) Briefly, a law was enacted in 1917 to tax admissions. After receiving testimony in committee hearings that cabarets charged no admission at the door and thus would not be subject to such a tax, the proposed draft was altered so as to include cabarets. This was done by adding a subsection in 1941, now 1700(e), which imposed:

> "* * * a tax of 1 cent for each 10 cents or fraction thereof paid for admission to any public performance for profit at any cabaret or other similar entertainment to which the charge for admission is wholly or in part included in the price paid for refreshment, services, or merchandise; * * *."

10(b) The court stated at page 197 of 88 F. Supp., which Congress states was its intention (R. 55):

> "Thus, from its inception, the admissions tax was imposed upon the general field of entertainment, which was further subdivided for purposes of the imposition of the tax into two different categories because of the nature of the entertainment subject to the tax. On the one hand was that form of entertainment to which a direct admission charge was made upon the patrons, as is the case with theaters, skating rinks or the like, and on the other hand that form of entertainment to which no admission charge as such was made but rather the charge for admission was included in whole or in part in the price paid by the patron for refreshment, services or merchandise. 'What are commonly known as cabarets' comprised this second category.

"It should be kept in mind that this tax imposed by Section 700 of the Revenue Act of 1917, supra, was an admissions tax which had been enacted in two parts because of the peculiar nature of the operation of cabarets, which necessitated a different basis and computation of the admissions tax in their case. It seems apparent therefore that Section 700(c) of the Revenue Act of 1917 was intended to supplement Section 700(a) of the Revenue Act of 1917, which was the general admissions tax section, and was enacted to reach that portion of the charge imposed by a cabaret furnishing a public performance for profit which could fairly be attributed to an admissions charge, regardless of the form in which the charge was imposed * * *."

10(c) In 1941, as set out at pages 205-6 of Judge Graven's opinion the method of computation of the tax was changed:

"It is interesting to note that in the last paragraph of Mim. 5255, set out above, the Commissioner of Internal Revenue classified 'dance halls' in the same category as motion picture theaters and skating rinks, apparently regarding all of these types of entertainment as imposing a general admission charge upon their patrons and thus falling within the terms of Section 1700(a) of the Internal Revenue Code imposing a tax upon amounts paid for admissions to any place rather than being within the terms of Section 1700(e) of the Internal Revenue Code taxing cabarets, roof gardens or other similar entertainments at a different rate and upon a different basis than the tax imposed by Section 1700(a) upon admissions gen-

erally. The classification of motion picture theaters, skating rinks, dance halls, etc., by the Commissioner in Mim. 5255, supra, becomes of increased importance in view of the fact that in this Revenue Act of 1941, for the first time since a tax upon these types of entertainment was imposed in 1917, that portion of the statute taxing cabarets, roof gardens or other similar entertainments no longer needed to be supplemented by that portion of the statute taxing admissions generally inasmuch as Section 1700(e) (the 'cabaret tax' section) now contained both a different rate and a different base than Section 1700(a) (the 'admissions tax' section) and was designed to tax any charges imposed by a cabaret, roof garden or the like in whatever form such charges were imposed. Thus, dating from the Revenue Act of 1941, Section 1700(e) was separate and distinct from Section 1700(a)."

10(d) In 1942, Section 1700(e), 26 U.S.C.A., was changed to read as follows:

"(1) Rate. A tax equivalent to 5 per centum of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The term 'roof garden, cabaret, or other similar place' shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food,

refreshment, or merchandise. A performance shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance. No tax shall be applicable under subsection (a)(1) on account of an amount paid with respect to which tax is imposed under this subsection."

10(e) At page 211 Judge Graven states:

"* * * It should be noted that in the year 1942 for the first time in the language of the statute itself there appears a definition of the term 'roof garden, cabaret, or other similar place.' It seems clear from the above discussion that by including such definition in the body of the statute Congress intended to support the position the Treasury Department had taken in its Regulations, that hotel dining rooms similar to those in the cases of United States v. Broadmoor Hotel Co. (30 Fed. 2d 440), and Busey v. Deshler Hotel Co. (130 F. 2d 187), should come within the category of a 'roof garden, cabaret or other similar place furnishing a public performance for profit' within the meaning of Section 1700(e) of the Internal Revenue Code * * *."

11. The purpose of Congress in passing this amendment was not to remove ballrooms from Section 1700 (a) under which they had been taxed for more than thirty years, but was to close a loophole in the cabaret tax Section 1700(e) which had permitted hotel dining rooms to escape the tax entirely since they had been held not taxable under 1700(e) and, since no admission was charged at the door, could not be taxed under 1700(a).

12. With the exception of the changes in rates from time to time, the above show the major changes in Section 1700(a) and (e) during the period from 1917 to 1951.

13. A clarifying addition to 26 U.S.C.A. 1700(e) (1942) was passed on October 20, 1951, and is copied verbatim from the Internal Revenue Code of 1951 (26 U.S.C.A., Cum. Supp. of 1946, Sec. 404 of 1951 Rev. Act, page 348):

> "(a) Ballrooms and dance halls.—Section 1700 (e)(1) (relating to tax on cabarets, roof gardens, etc.) is hereby amended by inserting after the second sentence thereof the following new sentence: 'In no case shall such term include any ballroom, dance hall, or other similar place where the serving or selling of food, refreshment, or merchandise is merely incidental, unless such place would be considered without the application of the preceding sentence, as a 'roof garden, cabaret, or other similar place'.'"

14. The following is the verbatim copy of 1700 (e) as it existed (a) when the refunds in suit were rejected by Respondents in 1952-3, (b) when the cases were tried below on November 17, 1953 (R. 107), when judgments were entered on June 28, 1954 (R. 107), and when the cases were docketed for review on appeal on the 24th day of January, 1955 in the Court of Appeals for the 8th Circuit:

> "(e) Tax on cabarets, roof gardens, etc.—(1) Rate. A tax equivalent to 20 per centum of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or

other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The term 'roof garden, cabaret, or other similar place shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. *In no case shall such term include any ballroom, dance hall, or other similar place where the serving or selling of food, refreshment, or merchandise, is merely incidental, unless such place would be considered, without the application of the preceding sentence, as a 'roof garden, cabaret, or other similar place.'* A performance shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance. No tax shall be applicable under subsection (a)(1) on account of an amount paid with respect to which tax is imposed under this subsection."

The portion in italics constitutes the clarifying 1951 additions, which Petitioners maintain was applicable to their operators in 1948 to 1951, when Petitioners were taxed under 1700(e) in Nebraska, and no other ballrooms throughout the nation were taxed (R. 105-7).

15. A further and an additional excise tax under 1700(e) was assessed in 1952-3-4 against each Petitioner of 20% of the amounts received by Petitioners for admissions paid dating back from Sept. 1, 1948, to

Nov. 1, 1951, and which was assessed after the taxes on refreshments were paid and claims for refund had been rejected therefor and the suits for refunds filed which are now before the Court.

Abatement claims were filed for these subsequently assessed amounts. By stipulation of record these abatement claims will abide the decision herein. These additional sums are significantly shown on the exhibits in evidence containing the other taxes in suit (R. 97; 71; 76; 78; 81; 86; 89; 91; 95), and are as follows:

Peony Park, Inc., $4,880.31; Geraldine L. Webber, $1,358.47; Glen L. Webber, $986.17; King's Ballroom, $652.35; V. C. Sloan, Pla-Mor, $3,047.95; Ferguson, $1,813.23; Schamp, $3,406.10; Howells Fire Department, $793.57.

The total additional 20% excise tax on admissions under 1700(e) was $17,660.67 assessed after the 20% tax on admissions had been paid under 1700(a). These are not included in the table on page 5 of this Petition for the Writ.

It was in 1952 and 1953 that this extra tax was assessed but it was dated back to the admissions taken in, beginning with Sept. 1, 1948, and was assessed for the entire 38 months' period in controversy upon all admissions assessed under 1700(a)(1). Claims for abatement were filed and denied.

16. The factual basis for lack of uniformity and intentional discrimination by the Commissioner of Internal Revenue against the appellants in reference to the taxes in question, 1700(e), in violation of Art. I, Sec. 8, Clause 1, Federal Constitution is as follows:

Petitioners Third Cause of Action (R. 16-24), makes the allegations of violation of the Uniformity Clause by the Commissioner, and sets forth the specific ballrooms in other states that gave proof thereof and makes reference to the correspondence and directives of the Commissioner to the ballroom operators in other states (R. 21-24). In order to make the necessary proof of the allegations of discrimination and lack of uniformity, Petitioners in the *Sloan* v. *United States* case herein, obtained an order to produce documentary evidence in reference thereto under Federal Rule 34, and which by stipulation applied to all nine cases (R. 36-39). One of the paragraphs of the Court Order directed to the Respondent (R. 41) stated:

> "A copy of such record or file in the Office of the Commissioner of Internal Revenue or available to him upon demand showing the date or dates of said cabaret tax under Internal Revenue Code Section 1700(e) was assessed and collected, or assessed, against ballrooms and dancehalls and the number of them as assessed for such tax in each of the states separately, of Minnesota, Colorado, North Dakota, Missouri, Illinois, Utah, and Connecticut, *and all other states in the United States, including Nebraska for 1948, 1949, 1950, and 1951, separately.*"

In response thereto the Commissioner produced Exhibits covering Missouri, Ohio, Colorado, Minnesota, North Dakota, Illinois, Connecticut, as well as Nebraska. These letters were received in evidence subject to materiality (R. 40,43-47). In substance, the letters prove that in these other states, including a letter to Nebraska, all dated on or about January 19, 1951, the Respondent Commissioner stated he was required by

legal decision to change his directives theretofore given in 1942 to the effect that these Nebraska dance halls and ballrooms were not liable for the cabaret taxes under 1700(e). He stated he based his changed opinion in 1948 on the Avalon and Geer (U.S. Court of Appeals decisions) and so stated that basis in the letter (R. 40).

The Commissioner wrote a similar letter on January 19, 1951, to the Collector in Omaha instructing him, as well as all the other Collectors, to start collecting the cabaret tax under 1700(e) against dance halls and ballrooms in Nebraska—which, as a matter of fact, the Collector in Nebraska had been doing since September 1, 1948 (R. 67, 68; 63-66. Compare R. 61 and 83). In the January 19, 1951 letter the Commissioner stated in effect to all Collectors, including Nebraska, as follows:

> "For your information, in view of the circumstances recited hereinbefore, it is the position of the Bureau that any dance halls which serve food or refreshments and which have been collecting and reporting only the admissions tax should not be held liable for the cabaret tax prior to the date when they are advised by your office of their liability for such tax." (R. 39; 41).

Petitioners were contrary to this letter taxed $95,370.34 and $17,660.67 after the letter or prior to its receipt.

17. A revenue agent in Omaha in 1948 wrote the Commissioner of Internal Revenue in Washington and asked for the privilege of taxing the ballrooms in Nebraska under 1700(e) (R. 63 to 66).

Accordingly in 1948 the Respondent local Collector in Omaha started enforcing against each Petitioner an excise tax of 20% on refreshments sold to dancers (R. 67-8). The Commissioner's right to so tax was claimed under said Sec. 1700(e) of the Internal Revenue Code which had been passed in 1942 and had thus been in full force and effect for six years. It had been applied only to cabarets where no admission charge was made at the door until Petitioners were forced to pay it beginning with September, 1948, as the result of the revenue agent request to the Commissioner directly—and which was granted (R. 63 to 69). The Commissioner knew the imposition of the tax was a discrimination against the Petitioners and was knowingly made and wilfully done (R. 105-7). That directive specifically stated that the cabaret tax under 1700(e) was not to be dated back prior to the time that such a notice was given (R. 41). This same letter was sent throughout the United States. There was no contrary evidence from the Respondent in any case and the trials proceeded and were decided upon the admitted proof that only Nebraska (and Iowa) ballrooms and dance halls were ever assessed for the cabaret tax except in a few instances hereinafter shown when the Collectors saw fit to do so and then only after February 1, 1951.

The Trial Court below in the cases at bar in his opinion found as a matter of fact that this enforcement policy was discriminatory and intentionally so by the Commissioner of Internal Revenue in the enforcement of the tax in question against the Petitioners as above stated. The opinion below in the United States District Court and affirmed by the Court of Appeals on that matter is as follows (R. 106):

"The adoption of this enforcement policy was in many respects unfortunate. It may be justified on the ground that the Commissioner was doubtful that the interpretation of the act by the Seventh and Eighth Circuit Courts of Appeals would be followed by other circuits and he did not want to involve the United States in expensive litigation to collect back taxes. Whatever his motives, the Commissioner's enforcement policy discriminated in favor of ballroom operators in states other than Nebraska. Further, the discrimination was intentional."

The Court of Appeals affirmed the Trial Court, and held there was no violation of the uniformity clause, in so laying and collecting an excise tax throughout the United States.

18. Series of letters were collected from ballroom operators in other states by the Petitioners seeking information as to when if ever in other states ballrooms were taxed under 1700(e) (R. 46-47-48-49). These letters were received in evidence to prove that the Commissioner did discriminate. The Collector from Minnesota reported to the Commissioner of Internal Revenue on May 22, 1952, as follows (R. 46):

"It is probable that the field deputy collectors, without making any special canvass of their territory, were not able to contact these operators immediately upon receipt of the instructions and probably did not, in many instances, call on them until November 1, 1951, and, of course, after November 1, 1951, the notice would have been erroneous in view of the specific provision added to the law by Section 404 of the Revenue Act of 1951."

On May 23, 1952, the Collector from Ohio in a letter to the Commissioner of Internal Revenue stated (R. 47):

> "* * * There is enclosed herewith a general notice sent to all dance halls located in this district which were collecting the admissions tax. This was done in accordance with the instructions contained in Bureau letter to this office dated January 19, 1951. No further correspondence with this taxpayer was had regarding the matter."

A letter from the Crystal Ballroom in Fargo, North Dakota to the Nebraska Ballroom Operator's Association stated (R. 49):

> "I am very happy to report that I was never notified to pay that tax so have never paid any. The boys in Minn. were to have started paying Nov. 1st."

The other letters from the differetnt ballroom operators showed that some of them started paying it at varying dates in 1951. Denver, Colorado, for instance, May 10, 1951 (R. 48).

These letters from various ballroom operators in other states were admitted, subject to stipulation that the only objection made was to their relevancy and materiality (R. 48). The Petitioners having plead the facts in connection with the discrimination and lack of uniformity in violation of Art. I, Sec. 8, Cl. 1 of the Federal Constitution, the matter was fully presented below in both courts by the pleadings and evidence (R. 21-23). (See further Record references to issues presented on page 2 of this Petition for the Writ).

The Order of the Court requiring the exact information on whether or not all other similar dance halls

in the United States were similarly taxed was very clear for, after designating the particular states mentioned above, the Court Order also stated "and all other states in the United States including Nebraska and pertaining to said cabaret tax on ballrooms and dance halls in said states from July 1, 1948, to and including December 31, 1951." (R. 38, Par. 3).

It is thus apparent in the record and was apparent to the trial court from the proof both from the Commissioner's letters and from ballroom operators in other states that the Findings of Fact of the trial court that the Nebraska Ballroom operators were discriminated against and intentionally so stands without refutation. Nevertheless the Court of Appeals failed to reverse.

19. The defense advanced by the Respondents and adopted by the trial court and affirmed by the Court of Appeals was to the effect that as the Constitution provided for uniformity geographically throughout the United States, and that Section 1700(e) as drafted by Congress complied with the requirements of the Constitution on geographic application the administration of laying and collecting need not be uniform (R. 106). Both courts ignored the decisions of the Courts that lack of uniformity in the enforcement of the law by a Chief Executive charged with that responsibility, if done knowingly and intentionally, is equally violative of the Constitutional provision as would be an expressed lack of uniformity in the Act itself from a geographical standpoint, as will be seen from United States Supreme Court cases.

20. No Appellant in any instance, as a matter of fact and admittedly at any time operated a Cabaret,

roof garden, or similar place which would be subject to the cabaret tax under 1700(e) as defined in its 1951 form or in its 1942 Form. There was no evidence to the contrary that Petitioners were not cabarets (R. 56-59; 60; 70; 61-3; 75; 77; 79; 82-4; 85; 85-88; 88-90;93-4; 95).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the Eighth Circuit erred:

1. In refusing to hold the Uniformity Clause (Art. 1., Sec. 8, Cl. 1) of the Constitution of the United States was violated when the uncontradicted evidence and the findings of the Trial Court, United States District Court of Nebraska, Omaha Division, (R. 105-6-7) found as follows:

> "In other words, the Commissioner adopted the policy in many states of collecting the tax only for periods after February 1, 1951; while in Nebraska he adopted a policy of collecting the tax for periods going back as far as 1948. The adoption of this enforcement policy was in many respects unfortunate. It may be justified on the ground that the Commissioner was doubtful that the interpretation of the Act by the Seventh and Eighth Circuit Courts of Appeal would be followed by other Circuits and he did not want to involve the United States in expensive litigation to collect back taxes. Whatever his motives, the Commissioner's enforcement policy discriminated in favor of ballroom operators in states other than Nebraska. Further, the discrimination was intentional." (R. 105-6-7).

2. In refusing to determine:

That the Congressional enactment of Nov. 1, 1951 (Int. Rev. C., 1951, Title 26, Sec. 404, 1946

Cum. Supp. P. 348) (R. 50-1-2-3-4-5) was an explanatory and definitive act passed to clarify the statute in question by expressing the Congressional intent concerning the previously enacted Statutes 1700 (a) and 1700 (e) of the Int. Rev. Code Title 26, U. S. C. A.

3. In refusing to make clear that when Sec. 1700 (a) was applied on admissions at the door that 1700 (e) must not be applied on sales within.

4. In holding as a separate matter that no additional tax was imposed by the Commissioner under Int. R. C. 1700 (e) on the admissions collected under Int. R. C. 1700 (a). Admittedly the record shows a total sum of $17,660.67 was so assessed against the Petitioners after each one had paid his taxes on admissions in the total of $211,006.34. It is a matter of stipulation of record (R. 97) that the sum total of $95,370.34 was layed and collected and request for refunds duly filed and which tax is the subject matter of the cases at bar. However, said sums did not include the subsequent further assessments of a 20% tax upon the admissions charged; and for which claims for abatement were filed, and denied by the Trial Court. This separate cause of action was properly presented to the Court of Appeals, and denied by that Court (R. 97 and 72, 76, 77, 79, 80, 81, 86, 89, 92, 95) (Government witness Van Wey R. 78, 88).

5. In failing and refusing to find and conclude that the Petitioners' operations should legally be taxed only under the admission tax statute, Int. R. C. 1700 (a). The result has been an injustice which the Respondents

rightfully should have corrected by refunds. Section 3772, Title 26 U.S.C.A., regarding refunds states:

> "* * * all taxes that appear to be erroneously or illegally assessed or collected * * * and all taxes that appear to be injustly assessed or excessive in amount or in any manner wrongfully collected."

6. In affirming the application of the law of the Avalon Amusement case in the 7th Circuit (1947) 165 F. 2nd, 653 to the decision below when the Court's attention was directed to the difference in the facts stipulated in Avalon and that the purpose of the Avalon decision was to prevent the evasion of the admission tax, which Avalon was attempting by making a compulsory charge for care of wraps after patrons were admitted. Thus Avalon formed no precedent for the application of stare decisis (*Geer* case in C.A.).

7. The expressed Congressional intent (R. 50-55) and the expression of the United States Supreme Court in the footnote five of the *Wilmette* case (338 U.S. 411, 70 S. Ct. 195) states the proposition of law contended for by Petitioners, i.e., that if the tax was paid under 1700 (e) then none may be imposed under Sec. 1700 (a):

> "Section 1700 (e) imposes a tax of 5* per cent on amounts paid for admissions, refreshments, services, merchandise 'at any roof garden, cabaret, or other similar place furnishing a public performance for profit'; in such cases no tax may be imposed under Sec. 1700 (a)".

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* Now 20%.

8. In affirming the decision of the United States District Court when the Record contained the foregoing seven reasons for reversal.

THE REASONS RELIED UPON FOR GRANTING THE WRIT OF CERTIORARI.

Review should be granted Petitioners because there exists in the Record grounds upon which this High Court has in other cases considered proper for allowance of writs under Sup. Ct. Rule 19 (b). The principal reasons are as follows:

1. (a) When the Court of Appeals below excused the Commissioner of Internal Revenue from his duty to grant the refunds for the excise taxes in question, it sanctioned a clear violation of Art. V., Sec. 8, Clause 1 of the Constitution of the United States. The constitution specifically contains both the words, i.e., laying and the collecting of excise taxes and states that these shall be uniform throughout the United States. Legal precedent by the Court of Appeals has now been established. It will permit the Revenue Collecting Executives to enforce excise taxes against identical operations of taxpayers, differently and indiscriminately throughout the Eighth Circuit at least. Admittedly the discrimination was sanctioned by the trial court and was affirmed by the Eighth Circuit (R. 105-7).

(b) The Int. Rev. Code Sec. 3772 afforded grounds for relief of Petitioners in such instances. It was a denial of due process and equal protection for the Eighth Circuit to have denied the refunds and abatements.

(c) Certiorari should be granted to aid the nine Petitioners to establish that the latitude and excuses pronounced by the Trial Court to exonerate the Respondent from his Constitutional duty to lay and collect excise taxes uniformly where affirmed establishes a false precedent for use in one of the most extensive branch of litigation before the Federal Civil Courts today, i.e., "Revenue and Taxation". This important question of Federal Law and the effect of the Constitution's uniformity provision, should be settled by this High Court, as prayed by Petitioners.

2. There are in the Court of Appeals opinion below, erroneous statements of law, and citations to opinions of the Supreme Court of the United States allegedly in support of such opinions of the Trial Court. Certiorari should be granted to determine the correct law for the guidance of Courts and lawyers concerning Federal Taxing Statutes and the enforcement thereof. For example, the following is part of the opinion of the Trial Court that was affirmed by the Court of Appeals to establish wrong precedent (R. 106), "Without belaboring the point, it seems clear that Congress must levy excise taxes with geographical uniformity throughout the United States." *Knowlton* v. *Moore*, 178 U.S. 41, 20 S. Ct. 747, 44 L. Ed. 969. Sec. 1700 (e) of the Revenue Code, both before and after the 1951 Amendment, applied by its terms to all states in the same manner. The Section as enacted complies with the requirements of the Constitution.

3. Thus the Court held the Commissioner was permitted to enforce the excise where and against whom he deemed it applicable, and do so indiscriminately, providing only the Tax Act as drawn, was geographicaly uniform.

4. The Court of Appeals in affirming, stated on page 10 of its opinion (which is appended hereto):

> "Section 1700 (e) applies by its terms to all states in the same manner, and hence complies with the requirement of geographical uniformity imposed by Article I, Section 8, Clause 1, of the Constitution of the United States."

5. This Court should grant certiorari to have (a) the question thoroughly briefed and discussed, whether or not the uniformity clause is violated by lack of uniformity in enforcement, i.e., collecting an excise tax in one state and not in others, when there exists admittedly no conflict in the subject matter of the tax, and (b) to decide whether or not *Knowlton* v. *Moore* (1900), opinion by Justice White, and *Pollock* v. *Farmers Loan & Trust Co.* (1895), opinion by Justice Field, constitute the authority of the United States Supreme Court for sustaining the opinion below.

6. To determine that *Miller* v. *Standard Nut Margarine Co.* (1932), opinion by Justice Bulter, 284 U.S. 498, 52 S. Ct. 260, decided that the uniformity clause is violated when there is a lack of uniformity in the enforcement of excise taxes. This Miller case was omitted from the Court of Appeals opinion.[1*]

1.* In the Knowlton case, the part of the opinion pertaining to the uniformity clause begins on Page 764 and ends on Page 773 of 20 S. Ct. In the Pollock case the uniformity clause discussion begins on Page 694 and ends at Page 695 of 15 S. Ct. Neither case dealt directly with excise taxes, and neither sustains the Courts below that uniformity geographically is the extent of the Constitutional requirements for uniformity in laying and collecting excise taxes. In *Fernandez* v. *Wiener* (1945) C. J. Stone, Syl. 18, P. 361 of 326 U. S., and Page 189 of 66 S. Ct., in

(Continued on next page).

7. The Petitioners' position on the invalidity of the tax, because neither layed or collected uniformly, justifies granting certiorari.

8. Certiorari should be granted to make more certain the applicable law to determine Congressional Intent. Congress amended Section 1700(e) for the express purpose of legislative reversal of the *Geer* case by the 8th Circuit, 185 F. 2nd 82, and the Avalon, 7th Circuit case 165 F. 2nd 653. Congress stated its intent was as found by the U. S. D. C., 88 F. Supp. 189, (R. 49-55). These expressions of intent took place before the cases at bar were tried in the District Court. An issue was made of congressional intent in the trial court and in the Court of Appeals (R. 102-105) (P. 6, 7,8). The opinion below is in conflict with *Jordon* v *Roache* (1912), 228 U. S. 436, 33 S. Ct. 573. The trial court in the cases at bar held that Roche stated the law applicable but concluded as follows, (R. 104):

> "The case is in point except for one rather important factor. This in not the Supreme Court; nor is it the Court of Appeals."

Chief Justice Marshall's opinion in *Alexander* v. *Mayor et al* (1809), 2 Curtis 173, 5 Cranch 1, 9 U.S. 1, 3 L. Ed. 19, concerning methods of learning legislative intent was cited by Petitioners but never mentioned by the Court of Appeals; nor was *Lukenbach S. S. Co.* v. *U. S.* (1929), 280 U. S. 173, 50 S. Ct. 148, given honorable mention, though presented to the Court

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(Continued from page 28).

discussing geographical uniformity under the Constitution, concludes:

"It requires only that what Congress has properly selected for taxation must be identically taxed in every state where it is found."

as authority for interpreting the act of 1951 in question and the proceedings leading up to its passage (R. 49 to 55) considered by Petitioners as important in interpreting congressional intent. Accordingly, the opinion below should be corrected, to conform to the stable pronouncement of this Court on the subject. Certiorari will open the way to do so.

9. The opinion below failed to follow the important decision in *Harrison* v. *Northern Trust Co.* (1943), 317 U. S. 476, 63 S. Ct. 361, opinion by J. Murphy. The opinion below admits that the Harrison case held that an "amendment was intended as a legislative reversal of the cases upon which the lower court relied". However, the court below in the case at bar failed to state that the United States Supreme Court said:

> "This contention loses all significance when it is remembered that (Sec) 807 was intented as a legislative reversal of Edwards v. Slocum. And compare United States v. New York, 315 U. S. 510, 62 S. Ct. 712, 86 L. Ed. 998."

10. A conflict here is apparent between the opinion below of the 8th Circuit in the case at bar and the rulings of the Supreme Court of the United States. When the record before the court is so explicit that it overcomes the technical aspects, such as the effective date of the explanatory act, it is apparent the gist of the Harrison case was overlooked.

11. The case of *N. Y. Trust Co.* v. *Helvering*, 292 U. S. 455, 54 S. Ct. 806, cited with approval *Jordan* v. *Roche*. The opinion states in reference to a similar enactment as the 1951 amendment to 1700(e):

"The definitions, so clarified was not New Law, but a more explicit expression of the purpose of the prior law."

12. Finally, the Petitioners submit, as grounds for the granting of the Writ, that the 8th Circuit Court itself has now two decisions in conflict with each other. The first one is in accordance with the law announced by the Supreme Court of the United States, and the later one (the opinion below in the case at bar) is in conflict with the other two.

In *Interstate Hotel Co.* v. *Remick Music Corporation* (1946), 157 F. (2d) 744, 8th Circuit the court held:

"A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law."

Ziffrin, Inc. v. *United States,* 318 U. S. 73, 78, 63 S. Ct. 465, 469, 87 L. Ed. 621; *Carpenter* v. *Wabash Railway et al.,* 309 U. S. 23, 26, 27, 60 S. Ct. 416, 84 L. Ed. 454; *Texas Co.* v. *Brown et al.,* 258 U. S. 466, 474, 42 S. Ct. 375, 66 L. Ed. 72; *VanDenbark* v. *Owen-Illinois Glass Co.,* 311 U. S. 538, 541, 542, 61 S. Ct. 347, 85 L. Ed. 327; *Hines v Davidourtz,* 312 U. S. 52, 60, 61 S. Ct. 399, 85 L. Ed. 581; *Standard Oil Co. of Kansas et al.* v. *Angle et al.,* 5 Cir., 128 F. 2nd 728, 730.

The Court below at pp. 8-9 of its opinion reversed itself by stating "the principles urged are not applicable to the facts in these cases. The cabaret tax has not been repealed".

However, under the theory advanced by Respondents the 1951 amendment was a new act. Was it not a

changed law? Was it not an amendment? Was it not a clarification of an existing law? The Petitioners submit if there was a change in the law the Appellate Court should have applied it to the cases before it on appeal as stated in Remick. This the 8th Circuit failed to do.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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WILLIAM J. HOTZ JR.,
1529-35 City National Bank,
Building, Omaha, Nebraska,
Counsel for Petitioners.

Dated at Omaha, Nebraska, August 4th, 1955.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,266

Peony Park, Inc., Appellant,

vs.

George W. O'Malley, Collector of Internal Revenue, Appellee.

No. 15,267.

Geraldine L. Webber, Appellant.

vs.

George W. O'Malley, Collector of Internal Revenue, Appellee.

No. 15,268

Glen Webber and Arthur F. Schmidt, Appellants,

vs.

George W. O'Malley, Collector of Internal Revenue, Appellee.

No. 15,269.

Blanche E. King and Harry H. King, Appellants,

vs.

George W. O'Malley, Collector of Internal Revenue, and D. V. Gordon, Director of Internal Revenue, Appellees.

No. 15,270.

Pauley Lumber Company, Appellant,

vs.

George W. O'Malley, Collector of Internal Revenue, and D. V. Gordon, Director of Internal Revenue, Appellees.

No. 15,271.

V. C. Sloan and E. H. Sheffert, Appellants,

vs.

United States of America and George W. O'Malley, Former Collector of Internal Revenue for the District of Nebraska, Appellees.

No. 15,272.

Robert L. Ferguson, Richard D. Ferguson, Roberta Ferguson, William L. Ferguson, and Robert J. Ferguson, d/b/a King's Ballroom, Appellants,

vs.

United States of America, Appellee.

No. 15,273.

Frank Schamp, Robert Schamp and Richard Schamp d/b/a East Hills Club, Appellants,

vs.

United States of America, Appellee.

No. 15,274.

Howells Volunteer Fire Department, a Corporation, Appellant,

vs.

United States of America, Appellee.

Appeals from the United States District Court for the District of Nebraska.

[June 24, 1955.]

William J. Hotz (William J. Hotz, Jr., was with him on the brief), for Appellants.

Harry Marselli, Special Assistant to the Attorney General (H. Brian Holland, Assistant Attorney General; Ellis N. Slack, Robert N. Anderson, and George F. Lynch, Special Assistants to the Attorney General; and Donald R. Ross, United States Attorney, were on the brief), for Appellees.

Before SANBORN, JOHNSEN, and VAN OOSTERHOUT, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

The appellants, hereinafter called the taxpayers, have appealed from final judgments of the District Court (memorandum opinion reported in 121 F. Supp. 690) dismissing their petitions for refund of cabaret taxes assessed pursuant to § 1700(e) (1), Title 26, U.S.C., 1946 Edition,[1] and paid. These appeals which involve common questions of law were consolidated by stipulation.

Each taxpayer operated a dance hall. Admission fees were collected from all patrons entering the dance halls,

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[1] §1700(e) Tax on cabarets, roof gardens, etc.-(1) Rate.
A tax equivalent to 5 per centum of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The term 'roof garden, cabaret, or other similar place' shall include any room in any hotel, restaurant, hall or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. A performance shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance. No tax shall be applicable under subsection (a) (1) on account of an amount paid with respect to which tax is imposed under this subsection.

and tax on such admissions was paid pursuant to 26 U.S.C., § 1700(a). Music for the dancers was furnished by a band. Tables, booths, and chairs were provided for the convenience of the dancers, and soft drinks, light refreshments, cigarettes, and other incidentals, including beer at some of the places, could be purchased for the usual prices of such articles. The Commissioner assessed and collected a cabaret tax upon such merchandise sold for the period from September 1, 1948, to November 1, 1951. Claims for refund were filed. The conditions precedent prescribed by 26 U.S.C., § 3772, had been complied with. The trial court had jurisdiction. 28 U.S.C., § 1340.

This court in *Birmingham* v. *Geer*, 185 F. 2d 82, cert. den. 340 U. S. 951, had occasion to consider the applicability of the cabaret tax under the identical statute here involved and upon a factual situation strikingly similar to the facts in our present cases. The District Court in *Geer* v. *Birmingham*, N.D. Iowa, 88 F. Supp. 189, in an excellent and exhaustive opinion, very fully reviewed the legislative history of § 1700(e) (1) and reached the conclusion that dance halls charging admission and paying admission tax were not liable for a cabaret tax on incidental refreshments sold. In reviewing the *Geer* case, this court followed the reasoning of *Avalon* v. *United States*, 7 Cir., 165 F. 2d 653, and held that the dance hall operator was taxable under § 1700(e) (1) upon refreshments and incidentals sold to dancing patrons, although the prices of the items sold were not increased by reason of the entertainment furnished, and conceding that an admission tax had been paid on the gate admission collected. All questions pertaining to the applicability of the cabaret tax under circumstances such as are involved in these cases were carefully and fully considered by us in the *Geer* case, supra.

Under the principle of stare decisis our decision in the *Geer* case fixes the rule to be followed in this circuit on the construction of § 1700(e) prior to the 1951 amendment thereto, unless there are cogent reasons for holding that the former construction was erroneous.

The taxpayers contend that this court in the *Geer* case failed to consider the case of *Wilmette Park District* v. *Campbell,* 338 U.S. 411. The district court in the *Geer* case cited the *Wilmette Park* case (at p. 215, 88 F.Supp.). Thus it would appear that this court was fully advised as to the *Wilmette Park* case at the time of its decision in the *Geer* case. The *Wilmette Park* case does not support the taxpayers' position as the applicability of the cabaret tax statute was in no way involved. The court's holding was that an admission charge to a municipal bathing beach was subject to tax under § 1700(a) (1). The taxpayers rely upon a footnote at p. 415 which in reciting various tax restrictions states, "Section 1700(e) imposes a tax of 5 per cent on amounts paid for admission, refreshment, service, or merchandise, 'at any roof garden, cabaret, or other similar place furnishing a public performance for profit'; in such cases no tax may be imposed under § 1700(a)." It would appear that the court in the *Wilmette Park* case was by said statement only intending to refer to that part of § 1700(e) (1) which states, "No tax shall be applicable under subsection (a) (1) on account of an amount paid with respect to which tax is imposed under this subsection." There has been no attempt made in the cases we are now considering to impose a caberet tax on the amount paid for admission at the gate. The tax on the gate admission was fully settled by payment of admission tax thereon. The taxpayers' liability for admission taxes is not involved in the present cases. We find nothing in the *Wilmette Park* decision which conflicts with our holding in the *Geer* case.

The taxpayers strenuously contend that section 404 of the Revenue Act of 1951[2], 65 Stat. 452, is to be applied retroactively, that this amendment is a clarifying amendment and, as such, is to be considered as part of the original Act. Under the Act as amended there would be no cabaret tax due. The Commissioner recognizes that this is the effect of the amendment as to future transactions, as no cabaret taxes have been collected from dance halls such as those involved here for any period subsequent to November 1, 1951, which is the effective date of the amendment.

The trial court held that since the 1951 amendment was passed to avoid the construction placed on § 1700(e) by the *Geer* case, it could not be considered as a declaration of existing law and that it was intended to and did effectuate a change. We agree with the trial court.

The question of whether a statute operates retroactively or prospectively only is one of legislative intent. Amendatory acts are ordinarily prospective in their operation and will be so construed unless a contrary legislative intent, either express or implied, is clearly shown. Courts have evolved a strict rule of construction against retroactive application of a statute. 82 C.J.S. 1005, Statutes, § 432; 50 Am.Juris. 494, Statutes, § 478; *Brewster* v. *Gage*, 280 U.S. 327; *Fullerton Co.* v. *Northern Pacific*, 266 U.S. 435; *Gerard Inv. Co.* v. *Commissioner*, 3 Cir., 122 F. 2d

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[2] Sec. 404. Tax on Cabarets, Roof Gardens, Etc.

(a) *Ballrooms and Dance Halls.*—Section 1700 (e) (1) (relating to tax on cabarets, roof gardens, etc.) is hereby amended by inserting after the second sentence thereof the following new sentence: "In no case shall such term include any ballroom, dance hall, or other similar place where the serving or selling of food, refreshment, or merchandise is merely incidental, unless such place would be considered, without the application of the preceding sentence, as a 'roof garden, cabaret, or other similar place'."

(b) *Effective Date.*—The amendment made by subsection (a) shall be applicable only with respect to periods after 10 antemeridian on the first day of the first month which begins more than ten days after the date of the enactment of this Act.

843; *Hassett* v. *Welch*, 303 U.S. 303; *Mogis* v. *Lyman Richey Sand & Gravel Corp.*, 8 Cir., 189 F. 2d 130. In 2 Sutherland, Statutory Construction (3rd Ed.), § 3004, at p. 225, it is stated:

"The usual purpose of a special interpretative statute is to correct a judicial interpretation of a prior law which the legislature determines to be inaccurate. Where such statutes are given any effect, the effect is prospective only." Both the House[3] and the Senate[4] Reports on the 1951 amendment show that Congress was fully aware of the interpretation placed on cabaret taxes by the *Avalon* and the *Geer* cases, and that it was its desire to amend the statute to avoid the construction placed on the original statute by the courts. It seems clear that Congress knew that it was changing the former law as interpreted by the courts. There is nothing in the amendment or in its

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[3] H.Rep. No. 586, 82d Cong., 1st Sess., p. 126

"Sec. 404. Tax on Cabarets, roof gardens, etc.

"This section amends section 1700(c) (1) of the Internal Revenue Code to exempt from the cabaret tax bona fide dance halls, ballrooms, and other similar places where the serving or selling of food, refreshments, or merchandise is merely incidental to the music and dancing privileges furnished unless the conduct of the place is such as to bring it within the normal concept of a roof garden, cabaret, or similar place. This determination will be made by reference to the over-all operation of the establishment, including such factors as the relative income from the several activities over a period of time, the relative portion of space devoted to the various activities, the type of refreshments served or sold, the scope and character of the entertainment furnished, and the hours of operation.

"The purpose of this amendment is to make it clear that the principles set forth by the district court in the case of *Geer* v. *Birmingham* (88 Fed.Supp. 189) are controlling in the determination of whether the establishment involved is operating as a cabaret or as a dance hall, and to avoid the broad construction placed upon the statute in the case of *Avalon Amusement Corporation* v. *United States* (165 Fed. 2d 653) and in the court of appeals decision reversing the decision of the district court in the *Geer* case (*Birmingham* v. *Geer*, 185 Fed. 2d 82), which requires that dance halls and similar establishments be taxed as cabarets even though the serving or selling of food, refreshments, or merchandise is merely incidental.

"The amendment made by this section shall take effect at 10 a.m. on the 1st day of the first month which begins more than 10 days after the date of the enactment of this bill."

[4] S.Rep. No. 781, Part 2, 82d Cong., 1st Sess., p. 69. The Senate Report is for all practical purposes the same as the House Report set out in footnote 3.

legislative history to warrant any inference that Congress intended the change to be retroactive. On the contrary subsection (b) of the amendment specifically provides that the amendment "shall be applicable only with respect to periods after [November 1, 1951] * * *." We have examined the cases cited by the taxpayers. The cases furnish no support for their contentions. In *Jordan* v. *Roche,* 228 U.S. 436, the court found that bay rum was taxable under the original statute. Subsequent to a circuit court decision holding otherwise, Congress amended the statute to make clear that bay rum was taxable. It was urged that this amendment constituted a declaration by Congress that bay rum was not subject to tax under the original statute. In rejecting this conclusion the Supreme Court said (p. 446):

"* * * The law was not the declaration of a new policy but a more explicit expression of the purpose of the prior law, made necessary by the judicial construction of that law."

In the Jordan case the Supreme Court disagreed with the prior circuit court decisions which induced the amendment. In the present cases the amendment was intended to change the law as interpreted by the Courts of Appeals of this Circuit and of the Seventh Circuit. There has been no Supreme Court determination that the interpretations made in the *Geer* and *Avalon* cases are erroneous. Consequently, in our present cases, the amendment changes rather than clarifies the prior statute.

Harrison v. *Northern Trust Co.,* 317 U.S. 476, relied upon by taxpayers, holds that the legislative history of an act should be examined. The court there found that the amendment was intended as a legislative reversal of the cases upon which the lower court relied. The legislative history in the *Harrison* case is similar to that in the present

cases in that in both instances the legislative history showed a desire to change an existing interpretation of the law by the courts. The *Harrison* case is authority for the proposition that the legislative history in the present cases demonstrates an intention to change the law and bring about a legislative reversal. In the *Harrison* case the question of retroactivity was neither involved nor discussed as the death creating the tax liability occurred after the effective date of the amendment. *Mogis* v. *Lyman Richey Sand & Gravel Corp., supra,* supports the Government's position rather than that of the taxpayers. Retroactive application of the amendment was there denied by this court. We there said (p. 142):

"In appraising amendatory legislation we must also observe the rule that unless the contrary appears and is constitutionally permissible, it must be given only prospective effect and not be allowed to operate retrospectively. * * *"

None of the other cases cited by the taxpayers is inconsistent with the result we reach. We are convinced that the record fully supports the conclusion of the trial court that the general rule to the effect that an amendment operates only prospectively is applicable in these cases, and that the 1951 amendment, as stated in the amendment itself, is only effective as of November 1, 1951.

The taxpayers further contend that statutory law, either as it exists after an amendment or does not exist at all at the time a case is reached on appeal, is subject to the rule of decision that a change in law between the time of trial and the time reached on appeal requires the appellate court to apply the changed law. In support of their contention the taxpayers cite *Caldwell* v. *Carmar Trading Co.*, D.C., D. Hawaii, 116 F.Supp. 546, and *Interstate Hotel Co.* v. *Remick Music Corp.*, 8 Cir., 157 F. 2d 744. The cited

cases and the principle urged are not applicable to the facts in these cases. The cabaret tax law has not been repealed. By the terms of the amendment the additional exemption is applicable only to periods subsequent to November 1, 1951. The provisions of the original act assessing the tax here involved are fully effective as to transactions prior to November 1, 1951.

As a final contention taxpayers urge that the collection of the taxes involved in these cases violates the uniformity requirement of Article I, Section 8, Clause 1, of the Constitution of the United States, in that similar taxes were not collected uniformly. The taxpayers received letters in 1942 from the Commissioner to the effect that their operations were not subject to cabaret tax. After the *Avalon* decision, on January 28, 1948, the Collector of Internal Revenue for the District of Nebraska took up the situation of the taxpayers with the Commissioner, and was advised on the strength of the *Avalon* case to collect cabaret taxes from the taxpayers after notifying them of the change in ruling. Notice of this change was given the taxpayers about September 1, 1948, and cabaret taxes were collected thereafter. The collection of the cabaret tax was uniform in Nebraska. Much evidence was introduced that in many other States no effort was made to collect cabaret tax from dance hall operators until 1951. The trial court decision in the *Geer* case was on January 10, 1950, and our decision in that case was filed on November 10, 1950. On January 19, 1951, the Commissioner wrote all collectors to enforce the cabaret tax against dance hall operators. Such letter states in part:

"Subsequent to the decision in the *Avalon* case it was the position of the Bureau that any dance hall which sold food or refreshments is liable for the cabaret tax and rulings issued since that time have been to that effect. How-

ever, because of the fairly apparent indications that the decision in the *Avalon* case would be tested in further litigation, no action was taken by the office to publicize such position of the Bureau or to notify dance halls generally of their liability for the cabaret tax, except in response to specific requests for rulings. In view of the concurring circuit court decision in the *Geer* case, it is now believed advisable to publicize the Bureau's position on this matter."

Section 1700(e) applies by its terms to all States in the same manner, and hence complies with the requirement of geographical uniformity imposed by Article I, Section 8, Clause 1, of the Constitution of the United States. *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1; *Knowlton* v. *Moore*, 178 U.S. 41; *LaBelle Iron Works* v. *United States*, 256 U.S. 377; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429. The history of the adoption of this Constitutional provision is very exhaustively covered in *Knowlton* v. *Moore*, supra. The statute itself clearly complied with all Constitutional requirements. Under the record in these cases there was no intentional discrimination against the taxpayers. There was some lack of uniformity in enforcement prior to 1951, but this was due to uncertainty in the interpretation of the law. The trial court in its opinion states (p. 695):

"In the cases under consideration the enforcement policy followed with respect to the taxpayers involved in the litigation is in keeping with the spirit and letter of the law. Insofar as these cases are concerned, neither the law nor its enforcement violates the Constitution."

A similar but not as exhaustive a record of lack of uniformity was made in the *Geer* case. We there said (p. 86):

"* * * The government was not there and is not here estopped by any practices or rulings that may have been made to have judgment herein according to the statute and the valid regulation interpretative of it."

None of the cases cited by the taxpayers supports their contention that the tax here assessed is unconstitutional.

The judgments of the District Court dismissing the petitions for refund of all the taxpayers are right, and they are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 325

PEONY PARK, INC., PETITIONER, ET AL.

v.

GEORGE W. O'MALLEY, COLLECTOR OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the District Court (R. 99-107) are reported at 121 F. Supp. 690. The opinion of the Court of Appeals (Pet. App. 2-11) is reported at 223 F. 2d 668.

JURISDICTION

The judgment of the Court of Appeals was entered June 24, 1955. The petition for a writ of cer-

tiorari was filed August 15, 1955. This Court has jurisdiction under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether amounts paid by patrons of petitioners' dance halls or ballrooms for refreshments and merchandise purchased by them during the period from September 1, 1948 to and including October, 1951, then subject to the cabaret tax under Section 1700(e)(1) of the Internal Revenue Code of 1939, were rendered untaxable by the October 20, 1951 amendment of Section 1700(e)(1) which excluded from that Section dance halls and ballrooms where the serving of refreshments, etc., was merely incidental, but which made that amendment effective only as of November 1, 1951.

2. Whether the Commissioner's enforcement of Section 1700(e)(1) prior to 1951 so lacked in uniform application as to cause the assessments here involved to violate the uniformity requirement of Article I, Section 8, Clause 1 of the United States Constitution.

STATUTES AND OTHER AUTHORITIES INVOLVED

Section 1700(e)(1) of the Internal Revenue Code of 1939, Section 404(a) and (b) of the Revenue Act of 1951, and Section 101.14 of Treasury Regulations 43 are set forth in the Appendix, *infra*, pp. 9-11.

STATEMENT

The facts as found by the District Court (R. 99) and concurred in by the court below (Pet. App. 2-3) may be summarized as follows:

Each of the petitioners operated a dance hall or ballroom, either indoors or outdoors, which consisted of a dance floor around which there were tables, chairs, and booths provided as seating accommodations for the patrons. Music was furnished for dancing by an orchestra or band regularly during certain nights of the week.

A charge for admission to the ballroom was made and during the periods involved petitioners collected from their patrons admissions taxes under Section 1700(a) of the Internal Revenue Code of 1939 on the amounts received from their patrons as the price of admission to their respective dance halls.[1]

In connection with the operation of petitioners' dance halls, refreshments, including sandwiches, soft drinks, beer, and cigarettes were served for the usual charges to those patrons desiring the same. The Commissioner assessed against each of the petitioners cabaret taxes under Section 1700(e) of the Internal Revenue Code of 1939 with respect to the amounts paid for such refreshments for the period extending from September 1, 1948, to November 1, 1951,[2] and such taxes were paid.

Claims for refund were filed and thereafter suits were duly instituted. The District Court entered judgments dismissing the complaint in each case (R. 107-108), and the Court of Appeals affirmed. (Pet. App. 11).

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[1] The admissions taxes are not involved in this litigation. (R. 2-3, 56, 124.)

[2] In assessing these taxes, credit was given for the admission taxes paid under Section 1700(a). (R. 72.)

ARGUMENT

1. Section 1700(e)(1) of the Internal Revenue Code of 1939, *infra*, pp. 9-10, imposed an excise tax of 20% (commonly known as the cabaret tax) on amounts paid for admission, refreshment, service, or merchandise at any roof garden, cabaret, or other similar place furnishing a public performance for profit. That Section also provided that a performance should be regarded as being furnished for profit even though the charge made for admission, refreshment, service, or merchandise was not increased by reason of the furnishing of such performance. At the time the instant cases arose, *i. e.*, prior to November 1, 1951, the language "roof garden, cabaret, or other similar place" was defined by that Section to include "any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise."[3]

While Section 1700(e)(1), as above outlined, was currently in force and effect, the court below and the Seventh Circuit held in the cases of *Birmingham* v. *Geer*, 185 F. 2d 82, certiorari denied, 340 U. S. 951, and *Avalon Amusement Corp.* v. *United States*, 165 F. 2d 653, respectively, that amounts paid by patrons of dance halls or ballrooms such as

[3] Substantially the same definition for that language was contained in Section 101.14 of Treasury Regulations 43, *infra*, p. 11.

those of petitioners were subject to the cabaret tax imposed by Section 1700(e)(1).

On October 20, 1951, after the *Avalon* and *Geer* cases had been decided, Congress enacted the Revenue Act of 1951 and by Section 404 thereof (65 Stat. 452, 521, *infra*, p. 10) amended Section 1700 (e) (1) so as to provide that dance halls and ballrooms where the refreshments, etc., served are merely incidental should be excluded from the application of Section 1700(e)(1). Section 404 of the 1951 Act provided that the amendment of Section 1700 (e)(1) should become effective on the first day of the first month more than ten days after the enactment of that Act. The effective date of the amendment was, therefor , November 1, 1951.

The instant cases all arose prior to November 1, 1951, and the factual situations therein are all practically identical with those presented in the *Avalon* and *Geer* cases. In consequence, the court below followed its prior decision in the *Geer* case and that of the Seventh Circuit in the *Avalon* case, and held that the cabaret tax was properly imposed on the payments involved. Thus, the only two circuit courts of appeal, which have construed Section 1700(e)(1) with respect to its application to dancing establishments such as those of petitioners, are in complete harmony of conclusion that the language of the section itself, as it existed prior to the 1951 amendment, reasonably justified a construction which brought such establishments within its purview.

Petitioners' contention (Pet. 29-30) that the 1951 amendment should be applied retroactively is without substance. The mere fact that the Committee reports which accompanied the bill (H. Rep. No. 586, p. 126 and S. Rep. No. 781 (Part 2), p. 69, 82d Cong., 1st sess. (See Pet. App. p. 6, notes 3 and 4)) stated that the purpose of the amendment was to overcome the effect of the decisions in the *Avalon* and *Geer* cases, is plainly not a manifestation by Congress of an intention to make the amendment retroactive where, as here, the Committee Reports show and the Act itself provides that the amendment shall become effective only on a future date.[4]

We submit that the construction placed on Section 1700(e)(1) in the carefully considered decision of the court below in the *Geer* case and that of the Seventh Circuit in the *Avalon* case, was a proper one to carry out the purpose of that Section as it existed prior to the 1951 amendment, and that the court below properly rejected petitioners' contention that the amendment should be applied retroactively. And since the 1951 amendment excludes from the application of Section 1700(e)(1), beginning with November 1, 1951, establishments such as those involved herein, further review of the instant cases is not warranted.

---

[4] In the circumstances, the decision of the court below is not, as asserted by petitioners (Pet. 29-31), in conflict with such cases as *Harrison* v. *Northern Trust Co.*, 317 U. S. 476; *Jordan* v. *Roche*, 228 U. S. 436; and *Interstate Hotel Co.* v. *Remick Music Corp.*, 157 F. 2d 744 (C. A. 8th.).

2. Petitioners' contention (Pet. 26-29) that the imposition and collection of the taxes involved violated the uniformity requirement of Article I, Section 8, Clause 1 of the Constitution of the United States is wholly without merit. The statute involved applies by its terms to all states in the same manner and operates with the same force and effect in every place where the subject of it is found. Hence, it complies with the Constitutional requirement of geographical uniformity. *Knowlton* v. *Moore,* 178 U. S. 41, 98, 105. Although there may have been some lack of uniformity in the administrative efforts made to collect taxes under Section 1700(e)(1) prior to 1951, as stated by the court below, "this was due to uncertainty in the interpretation of the law" and "there was no intentional discrimination" against the petitioners. (Pet. App. 10-11.) The contention that lack of uniformity in administrative efforts to collect the tax estopped the Government from collecting it was rejected by the court below in the *Geer* case (185 F. 2d at p. 86). Both courts below properly found that neither the statute itself nor its enforcement violated the Constitution. Hence, further review of the question is not called for.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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H. BRIAN HOLLAND,
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JOHN R. BENNEY,
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SEPTEMBER, 1955.

APPENDIX

Internal Revenue Code of 1939:

SEC. 1700 [as amended by Sec. 542, Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 622 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. TAX.

There shall be levied, assessed, collected, and paid—

* * * * *

(e) *Tax on Cabarets, Roof Gardens, Etc.*—

(1) *Rate.*—A tax equivalent to 20 per centum[9] of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The term "roof garden, cabaret, or other similar place" shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. A performance shall be regarded as being furnished for profit for purposes of this section even though the

[9] This rate was changed to 20 per centum by Section 1650 of the Internal Revenue Code of 1939, as added by Section 210 of the Revenue Act of 1940, c. 419, 54 Stat. 516, and amended by Section 302 of the Revenue Act of 1943, c. 63, 58 Stat. 21, and Section 3 (a), Public Debt Act of 1944, c. 240, 58 Stat. 272.

charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance. No tax shall be applicable under subsection (a)(1) on account of an amount paid with respect to which tax is imposed under this subsection.

* * * * *

(26 U.S.C. 1952 ed., Sec. 1700.)

Revenue Act of 1951, c. 521, 65 Stat. 452, 521:

SEC. 404. TAX ON CABARETS, ROOF GARDENS, ETC.

(a) *Ballroom and Dance Halls.*—Section 1700(e)(1) (relating to tax on cabarets, roof gardens, etc.) is hereby amended by inserting after the second sentence thereof the following new sentence: "In no case shall such term include any ballroom, dance hall, or other similar place where the serving or selling of food, refreshment, or merchandise is merely incidental, unless such place would be considered, without the application of the preceding sentence, as a 'roof garden, cabaret, or other similar place'."

(b) *Effective Date.*—The amendment made by subsection (a) shall be applicable only with respect to periods after 10 antemeridian on the first day of the first month which begins more than ten days after the date of the enactment of this Act.

Treasury Regulations 43 (1941 ed.):

SEC. 101.14 [as amended by T.D. 5192, 1942-2 Cum. Bull. 249]. *Scope of Tax.*—The term "roof garden, cabaret, or other similar place" includes any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. A public performance furnished at a roof garden, cabaret, or other similar place shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance.

Where music, whether by an orchestra, a mechanical device, or otherwise, and a space in which the patrons may dance is furnished in the dining room of a hotel, or in a restaurent, bar, etc., the entertainment constitutes a public performance for profit at a roof garden, cabaret, or similar place, and the payments made for admission, refreshment, service, and merchandise are subject to the tax.

* * * * *

Examples. (1) A proprietor of a dancing establishment provides for the serving of refreshments to his patrons. An admission or cover charge is made to each patron. In this case the admission or cover charges and also the charges for refreshment, service, and merchandise are subject to the tax.

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In The

Supreme Court of the United States

OCTOBER TERM 1955

No. 325

PEONY PARK, INC., (Consolidated herein with Eight Others who were Appellants Below) PETITIONERS,

V.

GEORGE W. O'MALLEY, Collector of Internal Revenue, Omaha, Nebraska (and the UNITED STATES OF AMERICA), RESPONDENTS.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, ENTERED OCTOBER 10, 1955.

MOTION FOR LEAVE TO FILE

Petitioners respectfully move for leave to file the annexed Petition for Rehearing of the order of this Court denying the Petition for Writ of Certiorari in this case, entered October 10, 1955. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, this Court by granting certiorari may review the right to partial relief to

the petitioners under newly designated grounds as will more fully appear in the following Petition for Rehearing.

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

The petitioners pray that this Court grant rehearing of its order of October 10, 1955, denying Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit and that a Writ of Certiorari issue to review the judgment of the said Court in the above entitled case as prayed for in the Petition for Certiorari filed herein on the 15th day of August, 1955.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

I.

The taxes involved and for which refunds should be granted were never the direct obligation of the petitioners to the government. The taxes were made an obligation of the petitioners if the petitioners failed to collect the tax from the purchaser of food and refreshments sold by petitioners to persons who consumed the purchases at the time and paid the bill without an increase of 20% of the gross food and refreshment bill. Obviously, if at a subsequent date the petitioners were notified by respondents that henceforth the tax must be collected or that such tax would become the obligation of petitioners, then from that time forward (assuming the tax was otherwise valid) the petitioners would be liable therefor. If,

however, a notice was given by respondents to petitioners that from a fixed date forward, the 20% tax should be assessed and collected, but the tax should not relate to any time previous to the receipt of such notice, and the respondent collector did reach back to the times of previous sales, obviously the petitioners were erroneously and unjustly and unlawfully taxed and the money for such period should be returned to petitioners, for two reasons: One, that the real taxpayer, the purchaser of the taxed and consumed merchandise, is no longer available as a subject for reimbursement, and secondly, if the record is clear enough to warrant definite affixation of proper dates and amounts, the cases should be reversed and remanded for such determination. Such, will be the effect of granting a hearing on this subject.

The evidence of record is clear that these petitioners were all taxed from September, 1948, to October 31, 1951 (R. 97 and Ex's 28, 37 to 46; Pet. for Writ pp. 5-6). The official letter in question admittedly went forward from the Commissioner of Internal Revenue on January 19, 1951, throughout the entire United States to each state collector, including Nebraska, stating, "For your information, in view of the circumstances recited hereinbefore, it is the position of the Bureau that any dance halls which have served food or refreshments and which have been collecting and reporting only the admission tax should not be held liable for the cabaret tax prior to the date when they are advised by your office of their liability for such tax." (R. 39, 41; Pet. for Writ, p. 18).

The record is clear that petitioners were not collecting the tax from customers and they were report-

ing and paying only the admission tax. Consequently the new aspect of the record for relief is that during the period from September 1, 1948 to January 19, 1951 (date of official notice) the petitioners should be granted the return of the money they paid respondents based on 20% of all food sold during that period and for which no taxes were collected from the purchasers. These figures are recorded facts and may readily be determined on remand if certiorari is granted.

II.

The petitioners were taxed after the letter of January 19, 1954, admonishing collectors to collect the excise taxes in question, only after notification and the directive that the petitioners "should not be held liable for the tax prior to the date when they are advised by your office of their liability for such tax" (R. 39, 41; Pet. for Writ, p. 18, and bottom p. 15, 16). The record is clear that as late as 1952-3 while these claims were being processed the Commissioner proceeded to levy and assess under the same taxing statute (I.R.C. 1700 e) 20% of the money received for admissions—not 20% tax on the admission tax (concern-which there is no dispute)—but 20% of the admissions charged and collected by petitioners over the entire period from 1948. These sums are readily ascertainable and are pending on claims for abatement subject to the outcome of this litigation. Denial of this rehearing will defeat the relief.

III.

Internal Revenue Code, Sec. 3772, was passed by Congress to afford relief in instances of unjust collec-

tion of taxes as well as illegal and unlawful assessments (I.R.C. Sec. 3772).

IV.

Within the confines of Sup. Court Rule 38 (b), there exists in the record and contained in the Petition for the Writ, which was denied herein on October 10, 1955, the following basic errors, which may be corrected now only by granting this rehearing:

A.

1. The violation of Art. I, Sec. 8, Clause 1, of the Federal Constitution, because all similar taxpayers throughout the nation were exonerated from the tax prior to January 19, 1951.

2. After January 19, 1951, the tax was not collected nor assessed uniformly throughout the nation.

3. The discrimination against petitioners in Nebraska was wilfully done and knowingly permitted as found by the Trial Court (Pet. for Writ, Spec. of Error 1, page 1, authorities, p. 27, 28).

B.

There will be left standing a conflict between decisions of this Court and the 8th Circuit, in reference to congressional intent and legislative reversal of an interpretation applicable to the statutes in question, which 8th circuit decisional interpretation never was intended by Congress. (Pet. for Writ, pp. 29-30, and reference to record therein).

C.

There is conflict between the 8th Circuit Court of Appeals decisions on the question of the interpretation courts should follow on appeals when the law has been changed, modified or amended by the time a case is reached on appeal, after the cause of action arose or after the assessment complained of was levied. (Pet. for Writ, pp. 31-32, and record references therein given).

CONCLUSION.

For the reasons set forth above and in the Petition for the Writ of Certiorari heretofore timely filed and accompanied by the certified record below, it is respectfully urged that rehearing be granted and that, upon such rehearing, a Writ of Certiorari issue to the Court of Appeals of the Eighth Circuit.

Respectfully submitted,

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Omaha, Nebraska,
Counsel for Petitioners.

Certificate of Counsel

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 33 of the rules of this Court.

WILLIAM J. HOTZ,
Counsel for Petitioners.

Dated at Omaha, Nebraska, October 21, 1955.